



# Criminal Division

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\*Mr. Wray frequently speaks from notes and may depart from the speech as prepared.

Thank you for that kind introduction and for the invitation to be here. It should be completely clear – even painfully clear – by now that rooting out corporate fraud and restoring public confidence in the integrity of our markets is one of the Administration’s highest priorities. I wanted to take this opportunity to talk about how the Government’s approach to criminal investigations of corporations has evolved since the announcement of the President’s Corporate Fraud Initiative about a year and a half ago. In particular, I want to focus on two interrelated issues – how we evaluate the authenticity of the company’s cooperation, and the importance of what we think of as the corporation’s culture. I also want to offer you some observations about how more and more companies appear to be changing the way they respond to criminal investigations – changing in a way we find encouraging. Let me start by quickly revisiting the background and the fundamental policy decisions of the President’s Corporate Fraud Initiative.

## **I. Recap of the Corporate Fraud Initiative**

### **A. Background of the Corporate Fraud Initiative**

As I was looking at the schedule for this conference, it struck me how much most of the topics you discussed yesterday – like Sarbanes-Oxley compliance, corporate crises and internal investigations – were profoundly affected by the Corporate Fraud Initiative. That initiative included the creation of the President’s Corporate Fraud Task Force, of which I’m a member, and the enactment of Sarbanes-Oxley.

The Corporate Fraud Initiative was a response to the parade of corporate scandals that began with Enron in late 2001 and continued with several other high-profile cases, like the Worldcom and Adelphia prosecutions that were announced in the summer of 2002. Now, we well understand that those companies are not representative of Corporate America. The vast majority of corporate executives are honest, hard working people. And the vast majority of corporations are law-abiding organizations that provide invaluable benefits to society, of course, in goods, services and jobs.

But that recent string of high-profile cases exposed some very disturbing instances of fraud and corruption at the highest levels of a number of major corporations, and sparked a real crisis of confidence in Corporate America. That confidence problem caused some serious harm. It undoubtedly contributed to declines in the stock market, and it may have even adversely affected the economy as a whole. One thing’s for sure – it has hurt many law-abiding corporations out there by unfairly tarnishing the reputation of American business in general.

## B. The Policies Behind the Corporate Fraud Initiative

The Corporate Fraud Initiative was a response to that crisis in confidence. It was also the most substantial reform of corporate law in 70 years. As the President put it when he announced the Corporate Fraud Initiative on July 9, 2002, America's greatest economic need is higher ethical standards. So the fundamental purpose of the Corporate Fraud Initiative is to set a new ethical standard for Corporate America. It's not to make business even more complex or cumbersome, but to reaffirm the basic principles and rules that make capitalism work – to use the President's words, truthful books and honest people, and well-enforced laws against fraud and corruption in business.

On the legislative side, the Sarbanes-Oxley Act included an updated new regime of regulatory requirements. Complying with those standards has now become an important part of your everyday lives.

Now, clearly some updated regulation was necessary and probably overdue. And we may see some more regulatory changes, especially in the wake of the recent revelations about problems in the mutual fund industry. But the experience of the Task Force so far has shown that a coordinated and sustained enforcement effort is a very effective way to raise ethical standards. One virtue of an enforcement-based response is that it enables companies to develop their own solutions to the crisis in confidence. In a more aggressive enforcement environment, businesses have an incentive to develop effective ways to ensure ethical conduct without having specific regulations imposed on them.

Some quarters of the news media have criticized us or questioned our enforcement-based response. But in fact, the Corporate Fraud Task Force has been quite successful in quickly and effectively rooting out corruption. The Task Force is chaired by the Deputy Attorney General, and, in addition to me and the head of the Department's Tax Division, includes several key U.S. Attorneys as members. It also includes a whole slew of law enforcement and regulatory agencies, including the FBI, the Postal Inspection Service, the SEC, the CFTC, the IRS, and quite a few others. Those agencies have collectively devoted enormous resources to fighting corporate fraud, including at least half a dozen national training and coordination conferences to help prosecutors and regulators pool their resources and hone their skills and strategies.

By marshaling the resources of those agencies, we have been able to conduct swift and thorough investigations – what we refer to as Real-Time Enforcement – even in the most sophisticated cases. The results so far have been stunning. From the inception of Task Force operations through September 30, 2003, we have opened more

than 300 corporate fraud investigations, charged more than 600 defendants (including at least 25 corporate CEOs), and secured more than 250 convictions. Some of the most highly publicized cases are already going to trial – senior executives of Enron, Worldcom, Adelphia, HealthSouth and other major companies will all be facing criminal juries in the next three or four months. And based on the sentences imposed so far, corporate fraudsters can expect to go to jail – about 75 percent of the defendants who have been sentenced have gotten prison terms. The Justice Department has recovered more than \$2.5 billion in restitution, fines and forfeiture. That's in addition to the billions of dollars recovered by the regulatory members of the Task Force, including the SEC and the CFTC.

## **II. Prosecution of Corporations**

Perhaps unsurprisingly, one result of increasing the resources we devote to investigating corporate fraud is that the number of corporations under investigation has increased, and the number of corporate entities charged themselves has increased.

Now, although corporate criminal liability has been blackletter law since at least 1909, prosecuting a corporation is unusual. But it happens. And it's happening more and more. We don't make the decision to charge a corporation lightly. Prosecuting a company is no substitute for prosecuting individuals who break the law. But sometimes bringing criminal charges against a corporation is the only fair and effective way to deal with a corporate culture that has been corrupted to the point that it tolerates and even encourages criminal activity. Some of you may have heard Larry Thompson say that without corporate criminal liability, a company could simply appoint a "Vice-President in Charge of Going to Jail," who would be a scapegoat for the collective acts that ought to be attributed to the company itself.

As many of you probably know, the Department of Justice has a longstanding policy of carefully examining all of the relevant factors before deciding to charge a corporation. Those factors are set out and discussed in some detail in what has come to be known as the "Thompson Memo," which Larry issued when he was the Deputy Attorney General. The factors we consider include: (1) the nature and seriousness of the offense; (2) the pervasiveness of wrongdoing within the company; (3) the company's history of similar conduct; (4) the company's timely and voluntary disclosure; (5) the existence and adequacy of the company's compliance program; (6) the company's remedial actions; (7) collateral consequences of a criminal prosecution; (8) the adequacy of any other available remedies; and (9) the adequacy of prosecuting individuals for the corporation's collective misconduct.

In many of the cases we have seen in the past couple of years, two of the most important factors we've focused on are the corporation's culture, and the authenticity of the company's cooperation. Those two factors are, in some sense, two sides of the same coin.

What do I mean by a corporation's "culture"? What some of the recent corporate scandals have shown is that companies sometimes develop a way of doing business that itself promotes criminality. Every company has a culture – a system of attitudes and practices that develops and continues over time. In most companies, that culture encourages hard work, innovation and respect for the law. In a few, unfortunately, the culture can breed contempt for the law, dishonesty and self-dealing. In those unusual cases where a company's culture has become so thoroughly corrupted that the culture itself is the problem, prosecution is sometimes the appropriate action.

Now, how can we as prosecutors and regulators assess or measure something as qualitative as the culture of a corporation? Well, the company's response to what is sometimes referred to as a "corporate crisis," like a criminal investigation, can be a reflection of the corporate culture. In other words, it's a test of the corporation's character.

Corporations that find themselves under investigation almost always tell us, and state publicly, that they are cooperating. As part of the Corporate Fraud Initiative, we're taking a harder look at whether the company is really cooperating with our investigation, or just paying lip service to cooperation. We're looking at where the company's response falls on a continuum between actually assisting the Government in an investigation and, at the other end, effectively impeding it. When a corporation acts responsibly – and promptly – to assist the Government, it can make an enormous contribution to the fair and speedy resolution of the investigation. All too often, though, the company's actions, even if they don't amount to downright obstruction, can delay and impede the investigation.

As part of our exercise of prosecutorial discretion, we give credit to companies that cooperate – provided that cooperation is authentic. On the one hand, that doesn't mean we automatically prosecute companies that don't cooperate. And on the other hand, in some rare cases, the conduct may be so outrageous that no amount of cooperation will persuade us not to bring criminal charges. But in most cases, cooperation is an extremely important factor, and getting credit for that cooperation can make a huge difference in our charging decision.

What I find especially encouraging – and a credit to a number of companies and

their executives – is that we are, in fact, seeing more and more cooperation. Maybe more companies recognize the resources we've devoted to corporate fraud and understand that we mean business. Maybe more companies see that when we talk about Real-Time Enforcement, we mean that these cases are being investigated and prosecuted in weeks or months instead of years. Maybe they realize that adopting a new ethical standard is really in everyone's long-term economic interest. Whatever the reason, those companies that have actually weathered a corporate crisis are almost invariably the ones that have shown that they understand cooperation means a lot more than just complying with our subpoenas.

### **III. New Corporate Standards of Ethics**

#### **A. New Approach to Culture and Cooperation**

Based on what we've seen over the past year or so, the Corporate Fraud Initiative has succeeded rather dramatically in getting companies to change their approach to both the culture issue and the cooperation issue. Our experience suggests that companies are actually adopting new ethical standards. For example:

- More and more, companies are taking a long hard look in the mirror, *before* there is a problem. They're asking themselves whether they have a culture that tolerates or even encourages corruption and criminal activity. And they're taking preemptive steps to reform their culture.
- More and more, companies are self-reporting criminal activity by corporate officers, even when it puts those officers at risk of prosecution. And they're voluntarily taking steps to help remediate the harm caused by that activity.
- And more and more, companies who find themselves involved in a criminal investigation are working hard to get credit for cooperating, and coming up with innovative and effective ways to assist the Task Force offices in our investigations.

#### **B. Reforming the Problem Culture**

The companies that are doing the most to set a new ethical standard are the ones that have gotten out in front of potential problems. What those companies have shown is that there are some powerful steps that you, as lawyers, can take to help protect your client. Now, I can't tell you how to do your jobs, and there is no magic formula for

identifying and solving a corporate culture problem. But here are some basic rules of thumb that we see companies using effectively to avoid becoming involved in a criminal investigation.

*First*, remember who your client is. All too often, lawyers who work for a corporation think of their client as the company's management. But your client is not management. It's not the board of directors. It's the corporation itself. That's an important distinction. When individual employees – especially senior management – have engaged in criminal activity, the long-term interests of the corporation itself may be very different from the interests of management.

*Second*, remember your fundamental role as a lawyer. You have an ethical obligation to give the corporation your independent professional judgment. Your role as a lawyer is much more than just drafting paperwork and rubber-stamping management's decisions. All too often, lawyers forget that giving their independent professional judgment is the only really valuable service they have to offer. On the one hand, some of the recent reforms, including whistleblower protection legislation and SEC rules requiring attorneys to report evidence of misconduct, have empowered attorneys to follow their ethical obligations by protecting them from retaliation. On the other hand, we're also moving aggressively to investigate and prosecute lawyers and other professionals who facilitate fraud.

*Third*, ask yourself some difficult questions. Ask yourself whether your company has a culture problem. As a key corporate official, you should know the corporate culture better than anyone, because you live and breathe it every day. Here are some more specific questions you might want to think about:

- Are you, or other employees, under an unreasonable amount of pressure to go along with management? Does management ask for – and consider – your professional judgment, or are you afraid to question management's decisions for fear of losing your job or being penalized in other ways?
- Are the CEO or other senior executives paid unreasonable amounts of money?
- Does the corporation have a history of regulatory problems? For example, has it settled a case brought by the SEC? Have those sanctions led to real and substantial changes in how the corporation does business, or have they been treated as merely a cost of doing business?

- Does the corporation have a dysfunctional system of corporate governance? Is the company's compliance program merely a paper program, or do the board, the audit committee and senior management have enough information, and enough time, to really exercise their own judgment about whether the company is complying with its legal obligations?
- Has the corporation, or have individuals at the corporation, engaged in conduct that makes you uncomfortable? Has anyone taken steps to conceal that conduct?

If the answer to any of those questions is yes, then you might want to think long and hard about the long-term interests of your client, that is, the corporation, and about your own ethical obligations.

### C. Higher Bar for Cooperation

As I mentioned earlier, the increased focus on enforcement has given businesses a powerful incentive to develop their own responses to the challenge of higher ethical standards. Companies are getting the message that cooperation is in the corporation's self-interest, and they're maximizing that self-interest by coming up with new and innovative ways to assist the Government.

Those companies are raising the bar. They want to make sure they get appropriate credit for cooperation, and they're working hard to demonstrate their commitment to cooperation. In other words, they're not just looking for a passing grade, they're shooting for an A+. Now, again, there's no magic formula. And let me be clear: None of the examples I'm going to mention is either a requirement on one extreme or a safe harbor on the other. What I want to emphasize is that the companies who are getting credit for cooperation are the ones who are actively looking for ways to cooperate, instead of doing the bare minimum necessary to comply with a subpoena.

First of all, the companies who are ringing up the most credit for cooperation are the ones who have firmly in mind that the Government is in the business of real-time enforcement. For example, in the HealthSouth case, which involves a fairly complex accounting fraud scheme, we have charged 16 defendants in just about 8 months, including the CEO. With that kind of real-time enforcement, you and your company may have to make some important decisions quickly. But that's better than having them made for you.

Another thing that more companies are doing is being more proactive. They call us, rather than waiting for us to call them. All too often, management decides to lay low and hope the crisis will blow over. But when the company sits quietly instead of coming forward to offer assistance, it's not only a red flag that something may be seriously wrong at the corporation, it also makes it less likely that the company will get credit for prompt cooperation. On the other hand, a company that steps up and initiates a dialogue makes a good first impression, and that may inevitably color our assessment of the other factors.

Here are just a few examples of some of the concrete steps companies have taken recently to demonstrate their commitment to cooperation. Again, these are just examples. They're not requirements, and they're not safe harbors. What they show is some of the innovative ways that corporations are coming up with to ensure that they get credit for cooperation:

- Some companies have made witnesses available whenever and wherever we want to interview them, without subpoenas. That's important, because it helps us investigate more quickly and more efficiently.
  - Some companies have taken swift disciplinary action, not only by replacing managers who are accountable for the underlying problems, but by terminating employees who refuse to cooperate with the investigation. That kind of decisive action is a strong reflection of the nature of the corporation's culture.
  - Many companies have turned over interview memoranda and other materials generated in their internal investigations, notwithstanding any claim of privilege they might have. Companies have directed professionals working for them, including outside auditors and counsel, to meet with the Government and give us prompt access to their workpapers and other records.
- > Now, I want to pause for a second to be very clear on this point: Waiving the privilege is not a requirement or a litmus test for cooperation. But it is a very valuable and helpful action by the company that goes a long way toward persuading us that its cooperation is authentic. It's a big step, and the companies who have taken that step have gotten a lot of credit for it.
- In some cases, companies have postponed or adjusted their internal investigations to suit our needs. Instead of working at cross-purposes,

companies are coordinating with the Government to contribute their own resources to the investigation in the most efficient way. That type of coordination can be critical – for example, it may be important to avoid creating additional statements from cooperators or other potential trial witnesses.

- Several companies have agreed to retain attorneys and accountants selected by the Government to evaluate their business practices, and have agreed to accept the recommendations of those professionals. That kind of commitment can produce real and substantial reform in a corporation with a culture problem.
- In a few cases, the company's most senior management has actually worked directly and regularly with the prosecutors handling the investigation, and directed the appropriate employees to get them the information they need on pain of being terminated. This kind of personal involvement of senior management can be a very impressive demonstration of a company's commitment to cooperation, and can send a powerful message throughout the company.

Those are just a few examples of how Corporate America has begun to meet the challenge of higher ethical standards. Just as innovation in business is rewarded by economic success, these types of actions show that innovation in the ethical arena has its own rewards.

#### **IV. Conclusion**

Removing the distractions of a corrupt culture and criminal activities can help the company focus on its core business. And by following your ethical obligations in the best interests of your client, you can make your company a better place to work, and help restore the public's confidence in Corporate America and in our markets. I would encourage all of you to think about new and innovative ways that you can help your companies meet the challenge of higher ethical standards, and help build confidence in American business and America's economy.

Thank you.